BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Court Below.

The findings of fact and conclusions of law and the opinion of the Court of Claims of the United States were filed on October 5, 1942 R. 55-91, inclusive).

An order denying claimant's motion for new trial was filed on February 1, 1943 (R. 92).

Jurisdiction of the Court.

The jurisdiction of this Court is invoked under Chapter 229, Section 3, of the Act of February 13, 1925, 43 Stat. 939, Judicial Code (28 U. S. C. A., § 288 (b)). The final order of the Court of Claims of the United States was filed on February 1, 1943. The petition for writ of certiorari was filed on May 1, 1943.

Facts.

The facts are stated in petition ante, page three to four. The fact is emphasized that the Court of Claims awarded not only the actual cost of completing the buildings, but in addition thereto liquidated damages and other damages, and also awarded a sum in excess of that demanded by the Comptroller General.

Specifications of Error.

1. The Court of Claims of the United States, in adjudging the United States of America recover from the petitioner the sum of $22,525.56, erred in including in that sum the amount of $13,601.00, made up of items of $100.00 liquidated damages, and $13,501.00 for rental values and proportional cost of salaries of officers.

2. The Court of Claims erred in failing to follow its previous decisions in the cases of *Fidelity & Casualty Company of New York* v. *U. S.*, 81 Court of Claims 495; *Commercial Casualty Company* v. *U. S.*, 83 Court of Claims 367; *American Employer's Insurance Company of Boston* v. *U. S.*, 91 Court of Claims 231, and the decisions in *Fidelity & Deposit Company of Maryland* v. *Robertson*, 136 Ala. 379 (1902); *Andrew A. Moore et al.* v. *Board of Regents for the Normal School in District Number Two*, 215 Mo. 705 (1909); *Thomas Gillen* v. *John L. Hubbard, impleaded with Garrett Van Cleve and George Ryerson*, 2 Hilton's Reports 303 (1859, N. Y.); *John Murphy et al* v. *Louis Buckman*, 66 N. Y. 297 (1876); and *Philip Brady* v. *The Mayor, Aldermen and Commonalty of the City of New York*, 44 Hun. 511 (1887, N. Y.).

3. The Court of Claims erred in failing to follow the decision of the Supreme Court of the United States in the matter of *Robinson, Administrator of Robinson* v. *U. S.*, 261 U. S. 486.

4. The Court of Claims erred in entering its judgment of October 5, 1942.

5. The Court of Claims erred in entering its order of February 1, 1943, overruling the petitioner's motion for a new trial.

Argument.

A. *When the Contracting Officer Terminated Petitioner's Right to Proceed Under the Contract, the Government Waived Its Right to Damages for Delay.*

The contract between the petitioner and the government anticipated and made provision for the following contingencies:

> "If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such dili-

gence as will insure its completion within the time specified in Article I, or any extension thereof, or fails to complete said work within such time * * *" (Article 9 of the contract, R. 25).

The time for completion, including the extended days, was November 30, 1934. On November 30, 1934, the contractor had not completed the work and, therefore, the last-mentioned of the above contingencies had arisen. In the event of the occurrence of any such contingency the contract provided that:

> "* * * the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there had been a delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise. * * *"

On December 10, 1934, the contractor received from the government notice of the termination of its right to proceed (R. 62). The government thereupon took over the work completed on September 12, 1935 (R. 64).

The circumstances then are these: The contractor failed to complete the work within the time specified and the government, in accordance with the terms of the contract, terminated the contractor's right to proceed, took over the work, and the same was prosecuted to completion.

What liability does the contract impose on the contractor for the contractor's failure?

> "* * * the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby." (Article 9; R. 25-26.)

So far the contract has made no mention of liquidated damages or damages. Liquidated damages is the subject of a succeeding provision of Article 9:

"* * * If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof. * * *."

The amount of the liquidated damages in the accompanying papers found in defendant's Exhibit 5, page 47, reads as follows:

"*Liquidated Damages.*—If the Contractor delays the completion of the work under this contract beyond the time for completion stated in the contract, then the Contractor shall pay the U. S. as fixed, agreed and liquidated damages the amount of Twenty-five dollars ($25.00) for each calendar day of delay until the work is completed or accepted, subject to the provisions of Article 9 of Government Form No. P. W. A. 51.

"If one or more buildings are accepted in advance of the whole, the total amount of liquidated damages collected under this contract will be decreased in the amount of Two Dollars and fifty Cents ($2.50) per day for each single officers' quarters and five ($5.00) dollars per day for each double company officers' quarters accepted."

It is at once apparent that the provision for damages for delay was waived by the government when it elected to terminate the contractor's right to proceed, and hence has no application to the instant case. The contractor's right to proceed with the work was terminated. The notice received by the contractor on December 10, 1934, could not have been more unequivocal:

"You are hereby informed that you are declared in default as of December 4, 1934, and your right to pro-

ceed with the work under the above-described contract is hereby terminated in accordance with the terms of said contract.

"A copy of this notice of default is being furnished to the surety on your performance bond (Fireman's Fund Indemnity Co.) and the surety will be given an opportunity to step in and complete the job. If the surety should not so elect, the United States will complete the work, and will look to you and your surety to make good any increased cost incurred by the Government."

Consequently, all of the provisions of the contract, including that for damages, contingent upon the government not terminating the contractor's right to proceed, were instantly rendered ineffectual and the liquidated damages awarded by the Court of Claims founded on such a provision was error. With this construction the authorities are in complete accord. See:

Fidelity & Casualty Company of New York v. *U. S.*, 81 Court of Claims 495;

Commercial Casualty Company v. *U. S.*, 83 Court of Claims 367;

American Employer's Insurance Company of Boston v. *U. S.*, 91 Court of Claims 231;

Fidelity & Deposit Company of Maryland v. *Robertson*, 136 Ala. 379 (1902);

Andrew A. Moore et al. v. *Board of Regents for the Normal School in District Number Two*, 215 Mo. 705 (1909);

Thomas Gillen v. *John L. Hubbard, impleaded with Garrett Van Cleve and George Ryerson*, 2 Hilton's Reports 303 (1859, N. Y.);

John Murphy et al. v. *Louis Buckman*, 66 N. Y. 297 (1876);

Philip Brady v. *The Mayor, Aldermen and Commonalty of the City of New York*, 44 Hun 511 (1887, N. Y.);
Robinson, Administrator of Robinson v. *U. S.*, 261 U. S. 486.

B. *If the Government, by Terminating the Contractor's Right to Proceed, Did Not Waive Its Right to Damages for Delay, Then the Provision Calling for an Agreed Stipulated Sum of Damages for Delay Is Binding.*

The provision for damages for delay reads:

> "Liquidated Damages. If the Contractor delays the completion of the work under this contract beyond the time for completion stated in the contract, then the Contractor shall pay the U. S. as fixed, agreed and liquidated damages the amount of Twenty-five dollars ($25.00) for each calendar day of delay until the work is completed or accepted, subject to the provisions of Article 9 of Government Form No. P. W. A. 51.
>
> "If one or more buildings are accepted in advance of the whole, the total amount of liquidated damages collected under this contract will be decreased in the amount of Two Dollars and fifty Cents ($2.50) per day for each single officers' quarters and five ($5.00) dollars per day for each double company officers' quarters accepted."

This provision calls for the payment of damages for delay at the rate of $25.00 per day for each calendar day, and it also calls for an allowance for the buildings as they are completed.

There is no finding by the Court of Claims justifying the delay of the government of over 130 days (from December 10, 1934, to April 12, 1935) in reletting the contract, and for which delay damages were awarded against petitioner at the rate of nearly $50.00 a day.

The award made by the Court of Claims is equivalent to approximately $50.00 per day in total disregard of the provisions for damages at $25.00 per day. It is submitted that the Court of Claims erred in not following the decision of the United States Supreme Court in the case of *Robinson, Administrator of Robinson* v. *U. S., supra,* where the Court enforced such a provision in a contract with the United States government.

Conclusion.

It is submitted, therefore, that this Court should allow the petition and order the writ of certiorari to issue to the Court of Claims of the United States.

Very respectfully submitted,

GEORGE E. BEECHWOOD,
ROBERT G. KELLY,
CONLEN, LABRUM & BEECHWOOD,
Attorneys for Petitioner.